

FINAL AWARD ALLOWING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-107618

Employee: Michael Russell  
Employer: Mattingly Lumber & Millwork  
Insurer: Federated Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: October 21, 2003  
Place and County of Accident: St. Charles, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 21, 2005.

We note that the index set out on page B of the transcript lists the exhibits of employer/insurer incorrectly. The exhibits submitted by employer/insurer consisted of the deposition of Dr. Ravi Yadava, including attachments to the deposition, labeled as exhibit one and admitted by the administrative law judge on page 31 of the transcript; and exhibit two, which are the records of Dr. [sic] David Overby, the physical therapist, which were admitted by the administrative law judge on page 31 of the transcript. The exhibits listed in the index for employer/insurer were not offered or admitted into evidence. We assume the index is a typographical error of the court reporter, but it has no bearing on our review of the claim.

The Commission further approves and affirms said administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued March 21, 2005, are attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12<sup>th</sup> day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

SEPARATE OPINION FILED

Attest: John J. Hickey, Member

\_\_\_\_\_  
Secretary

SEPARATE OPINION  
CONCURRING IN PART  
DISSENTING IN PART

I would modify the administrative law judge's award and decision to increase the award of 5% permanent partial disability to 15% permanent partial disability. I would additionally modify the award and decision to award employee future medical care to cure and relieve him from the effects of his work injury.

Employee is still suffering from pain and loss of range of motion in his cervical spine. Although Dr. Yadava released employee from care without restrictions and found no permanent partial disability, I find Dr. Yadava discounted employee's ongoing complaints. Dr. Nester found employee demonstrated a 50% loss of motion in all areas of his cervical spine. Additionally, employee testified that he is no longer able to drive a tractor trailer because he cannot turn his neck enough to see to back up or to turn his neck to the left to see oncoming traffic. I find employee's testimony credible.

The administrative law judge placed much emphasis on the fact that employee did not miss work or missed very little work as a result of his injury. That is not the test. If a work related injury harms an employee's earning power, he has suffered a disability. *Feltrop v. Eskens Drywall and Insulation*, 957 S.W.2d 408 (Mo. App. 1997). Employee at a minimum sustained a soft tissue injury to his cervical spine and which has had an ongoing impact on what duties he is able to perform. The fact that he continued to work does not equate to a finding that the extent of his disability is miniscule. Based upon his complaints and demonstrated decrease in his range of motion as determined by Dr. Nester, I find employee sustained 15% permanent partial disability.

Additionally, I find he is entitled to future medical care in the form of pain management and/or physical therapy. Although Dr. Nester initially recommended trigger point injections, he altered his opinion after discovering that employee had an adverse reaction to a trigger point injection. Dr. Yadava also believed that employee would benefit from a home exercise program, although he did not believe that he had anything further to offer employee from a physician standpoint. I am persuaded that employee would benefit from future medical care as recommended by Dr. Nester, with the exception of trigger point injections, and I would award the same.

Because I would modify the award and decision as stated above, I respectfully submit this separate opinion.

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John J. Hickey, Member

**AWARD**

Employee:	Michael Russell	Injury No.:	03-107618
Dependents:	N/A	Before the	
	<b>Division of Workers'</b>		
Employer:	Mattingly Lumber & Millwork	<b>Compensation</b>	
		Department of Labor and Industrial	
Additional Party:	Second Injury Fund (left open)	Relations of Missouri	
		Jefferson City, Missouri	

Insurer: Federated Mutual Insurance Company

Hearing Date: January 26, 2005

Checked by: JED:tr

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: October 21, 2003
5. State location where accident occurred or occupational disease was contracted: St. Charles, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee was operating company truck when he was involved in a motor vehicle accident.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Cervical spine
14. Nature and extent of any permanent disability: 5% PPD referable to cervical spine
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$7,024.45

Employee: Michael Russell

Injury No.:

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17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$808.93
19. Weekly compensation rate: \$535.95/\$347.05
20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable:

20 weeks permanent partial disability from Employer \$6,941.00

22. Second Injury Fund liability: Open

TOTAL: \$6,941.00

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Brown & Crouppen

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Michael Russell	Injury No.: 03-107618
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Mattingly Lumber & Millwork	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund (open)	Jefferson City, Missouri
Insurer:	Federated Mutual Insurance Company	Checked by: JED

**This case involves a motor vehicle accident in which Claimant was driving a tractor-trailer and was rear-ended by a small truck on the reported accident date of October 21, 2003. Claimant's head contusion resulted in treatment for cervical symptoms. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund is a party to this claim but remains open for a determination of liability at a future date. Both parties are represented by counsel.**

### Issues for Trial

1. Liability for additional medical treatment (MMI); and,
2. Nature and extent of permanent partial disability.

### FINDINGS OF FACT

### Dispositive Evidence

Claimant testified about the details of the motor vehicle accident which is the subject of the reported injury. Upon being rear-ended by the other vehicle, a small truck, he hit his head on the ceiling of the cab and against the back of the cab. His seatbelt had no shoulder strap and the seat had no headrest. Nevertheless, Claimant drove his tractor-trailer back to Employer's yard. It is unclear from the record whether he finished his shift.

Claimant treated at BarnesCare for six weeks including physical therapy. He was not off work for this period. He was subsequently referred to Dr. Yatava who administered an injection to which Claimant had a poor reaction. Claimant lost no time from work until this injection. Months later, Claimant underwent a myelogram which revealed a cervical disc bulge and spurring. Claimant apparently had a poor reaction and required about one week off work for the days preceding and following a blood patch administered pursuant to the myelogram mishap.

Claimant returned to work to the same job duties of truck driving with the exception that he no longer drives the tractor-trailer truck because of his curtailed cervical range of motion laterally. He complains of a stabbing pain when he attempts extremes of motion. He continues to work and avoids more effective [narcotic] pain relievers because of the safety requirements of his job and commercial driving limitations.

Although Claimant had no recorded prior cervical injury or treatment, radiographic evidence of advanced pre-existing degenerative disc disease is found in the record.

The record contains no independent evidence of impact that might be probative of the force with which Claimant contused his head. Claimant's tractor-trailer was apparently drivable; it is unknown what impact was created by the force with which the small truck struck the tractor-trailer.

#### Treatment Record

The claimant was initially seen at Barnes Care and was diagnosed with cervical strain and contusion of the head. The claimant received physical therapy from October 22, 2003 through December 3, 2003, for a total of fourteen visits. An MRI of the cervical spine was performed, which showed an osteophyte at the C2-3 level. He was referred to Dr. Yadava after continued complaints.

Dr. Yadava performed trigger point injections in conjunction with physical therapy from December 2003 through February 2004. Claimant testified at trial that he had a bad reaction to a cervical injection. But the December 29, 2003 note reflects Claimant did not contact Dr. Yadava's office after his reaction. No lost time or other consequence thereof appears in the record.

On February 6, 2004, the claimant reported that he was doing well, and was happy with his results. The clinical exam revealed no soft tissue irritation. There was full range of motion without pain. Claimant was found to have attained maximum medical improvement and no further treatment was scheduled. Dr. Yadava assigned no permanent partial disability.

\* \* \*

Despite no lost time from work, Employer authorized an additional visit on April 8, 2004 in which both clinical findings and accident history were unchanged. After another two-month treatment gap, Claimant was authorized for a final visit on July 12, 2004 with renewed complaints of discomfort and headaches. Dr. Yadava ordered a CT myelogram which was performed on July 21, 2004. The CT showed left posterior and plate spur formation at the C2-3 level and a small central posterior disc protrusion at the C5-6 level. Dr. Yadava reviewed the films and felt that everything was as it should be. Dr. Nester is not a treating physician.

#### Dr. Yadava

Dr. Yadava testified the findings of the C5-6 level of a small posterior disc protrusion had no clinical significance. Again, no further treatment was scheduled and no PPD was assigned. Dr. Yadava prepared a

supplemental report dated November 1, 2004, following his review of Dr. Steve Nester's report dated August 30, 2004. Dr. Yadava testified that Dr. Nester's recommendations for additional medical treatment, continued physical therapy, trigger point injections, and pain medications were redundant and, ultimately, the procedural techniques would not provide the sustained results until the claimant dedicated himself to sustain good mechanics. He noted that he continued to believe that the claimant was at maximum medical improvement and sustained zero percent permanent partial disability.

#### Dr. Steven Nester

Claimant's expert, Dr. Steven Nester for an evaluation on August 24, 2004. Upon examination, he had decreased active range of motion. His diagnoses were generalized neck pain with soft tissue component, as well as a bulging disc at the fifth and sixth cervical level. He opined that the disc, which was bulging, was suspected to be responsible for at least a degree of his discomfort. He still thought Claimant's condition warranted further continued treatment and evaluation for his condition. He suggested perhaps physical therapy.

### RULINGS OF LAW

#### Maximum Medical Improvement and Additional Medical Treatment

Claimant's complaints are difficult to reconcile with his demonstrated ability to work and the absence of lost time. On the other hand, records also reflect Claimant exhibited consistently negative clinical examinations which is very consistent with his accumulated record of nearly no lost time. Claimant's job is physical and he has no measurable sedentary duties. Claimant seeks additional medical treatment. Claimant has not complained of the quality of treatment or sought a change of provider under Section 287.140.2 RSMo (2000). Claimant in this case failed to meet his burden of proof on this issue.

Claimant has the burden to prove entitlement to future medical treatment. The standard of proof required cannot be met simply by offering testimony that it is possible that Claimant will need future medical treatment. The standard is one of reasonable probability that future treatment will be needed and that it is needed as a result of the reported injury. Landers v. Chrysler Corporation, 963 S.W.2d 275 (Mo. App. 1997); Dean v. St. Luke's Hospital, 963 S.W.2d 601 (Mo. App. 1997). Future expense awards may be indefinite but the underlying theory of *medical causation* may not. See Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997), Williams v. A.B. Chance Co., 676 S.W. 2d 1 (Mo. App. 1984), and Griggs v. A.B. Chance Co., 503 S.W.2d 697, 703 (Mo.App. 1973).

Here, Claimant was found to be at maximum medical improvement on more than one occasion by Dr. Yadava and each time in context with his ability to perform a physically demanding job. Not only is Claimant's assertion of additional treatment indefinite in his medical proof, the balance of the record fails to demonstrate the "effects of the injury" from which he seeks relief. Section 287.120.1 RSMo (2000). As a result, he has failed to meet his burden of proof on this issue and his claim for future medical benefits must be denied.

Dr. Nester's testimony is fairly described as indefinite and equivocal. Dr. Nester asserted additional treatments could help Claimant but failed to reconcile important facts of no lost time and the continuous and ongoing ability to work. Dr. Yadava directly rebutted Dr. Nester's recommendations for additional medical treatment, continued physical therapy, trigger point injections and pain medication were redundant and the procedural techniques would not provide the sustained results until the claimant dedicated himself to sustain good results. Dr. Nester saw the claimant just a month after Dr. Yadava had last seen him. The treatment recommended by Dr. Nester is of the same nature as what had already been provided to the claimant at BarnesCare and by Dr. Yadava.

The following interpretation is useful in an analysis of MMI. "Temporary disability awards are intended to cover a healing period. Temporary total disability is to be granted for the time prior to when the employee can return to work . . . neither temporary total disability nor temporary partial disability is intended to encompass

disability after the condition has reached a point where further progress is not expected." Williams v. Pillsbury Co., 694 S.W.2d 488, 489 (Mo.App. 1985). Here, further progress is not reasonably expected.

Claimant apparently did not perform his exercise program as prescribed. Even though he was informed by Dr. Yadava and the physical therapist that he would need to be fastidious in his exercise program, Claimant admitted he only performed his maintenance program for three weeks following his release from care. Taking into account the nature of the injury, the extent of his treatment, his physical well being which permitted his lack of compliance with therapy, as well as Dr. Yadava's opinions, there is no basis to impose further liability for medical treatment. Thus, the evidence compels a finding that Claimant attained maximum medical improvement.

### Permanent Partial Disability

Records indicate Claimant previously described his pain as seven out of ten. In contrast, Claimant had no lost time from work except the day after the accident and the week surrounding the reported bad reaction to the injection. Despite nearly no lost time from work, and release from treatment, Employer authorized two additional visits in April and July 2004. Again, No lost time accompanied either of these visits.

Myelogram revealed prominent degenerative change (osteophyte) notable for Claimant's relative young age. Also revealed was a disc bulge at C6-7 which finding is unaccompanied by clinical findings in the extremities which are innervated by that dermatome.

Claimant's expert testimony lacked analysis. Dr. Nester recommended routine physical therapy for what he attempted to characterize as a serious chronic condition and which had neither been treated on any regular basis for the prior seven months. His testimony was also somewhat incomplete as demonstrated by his non-conventional and incomplete descriptions of orthopedic measures. This is consistent with his emphasis in family practice medicine rather than one concerned primarily with vertebral disc pathologies.

Nevertheless, while Claimant's testimony does not closely follow either the medical record or his employability post-accident, he has an advanced degenerative condition which was aggravated by the reported accident. Claimant had persistent complaints disposing Dr. Yadava to administer injection therapy. Orthopedists routinely testify that some PPD may naturally flow from such a scenario. This inference is tempered by the lack of lost time herein.

It is relevant to note that prior courts have held an employee who returned to work the day following the reported accident and worked continuously at the same job performing the same work until the hearing was able to recover PPD benefits. Komosa v. Monsanto Chemical Co., 305 S.W.2d 506, 507-508 (Mo.App. 1957).

### Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, the claimant is found to have sustained five percent permanent partial disability of the body referable to the cervical spine. The claim for additional medical treatment is denied. The SIF remains open.

Date: \_\_\_\_\_ Made by: \_\_\_\_\_

Joseph E. Denigan  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

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Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*